No. 22,786

IN THE

United States Court of Appeals

For the Ninth Circuit

OPERATING ENGINEERS LOCAL UNION NO. 3, an unincorporated association, THE INTERNATIONAL UNION OF OPERATING ENGINEERS, an unincorporated association, HAROLD L. BOWEN, JAMES F. CHURCH, P. H. MCCARTHY, JR., et al.,

Appellants,

vs.

B. R. BURROUGHS,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division

APPELLANTS' OPENING BRIEF

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JURISDICTION

Operating Engineers Local Union No. 3 (hereinafter called Local) and International Union of Operating Engineers (hereinafter called International) Appellants, are, and each of them is, a Labor Organization within the meaning of 49 USC 492(i). B. R. Burroughs, Appellee, is a member within the meaning of 49 USC 402(o) (R 1 and 2).

Jurisdiction is based on 49 USC 412, 49 USC 411 (a)(4) and 529 and under 28 USC 1291 from the final Order and Judgment made and entered by the District Court in this matter (R 222-223).

STATEMENT OF FACTS

That the Local's territorial jurisdiction extends from and includes the Territory of Guam, State of Hawaii, Northern California, Northern Nevada, and the State of California with a membership of in excess of 3,100 (R 169-170).

That proceeding to elect Local Officers commenced in January, 1966 by publication of a Notice in the official paper of the Local mailed to all members, which notice was repeated in the February, 1966 edition.

That in accordance with the requirements of the By-Laws additional notices concerning the forthcoming election were published in the March, April, May, June and July, 1966 editions and mailed to all of the members.

That the notice in the July, 1966 issue specified, among other things, (a) that the ballots and return envelopes be mailed August 10, 1966, and (b) the Ballot Box, i.e. Post Office Box, to which the return envelopes were addressed would be opened at 10 A.M., August 26, 1966 for the first and last time (R 171-172).

That Burroughs actively participated in the affairs of the Union as follows:

He was:

1. a Dispatcher employed by the Local, 1946
2. a Business Representative employed by the Local, 1946-1952, and again 1955-1956 (R 173)
3. a By-Law Committeeman, 1959-1960
4. a Delegate to the International Convention, 1960—April
5. Defeated in election for office of Recording-Corresponding Secretary, 1960—November
6. Defeated in election for office of Business Manager, 1963
7. Defeated in election of Delegates to 1964 International Convention
8. Defeated for office of Trustee, 1966 (R 170-171).

That under date of December 12, 1965, Burroughs first raised objections to the conduct of the Local election by letter to the Local Business Manager (R 172) and thereafter by various letters to the Business Manager, the Election Committee, the Officers, District Executive Board Members and District Representatives, acting Executive Board Advisors, and Secretary of the Election Committee dated February 19, 1966, June 15, 1966, June 16, 1966, June 22, 1966, July 10, 1966, July 16, 1966, July 17, 1966, July 18, 1966, August 4, 1966, August 5, 1966, August 11, 1966 (R 121-168).

That it was not until June 18, 1966 that Burroughs appealed to the General President and General Ex-

ecutive Board of the International Union (R 132, R 175) receipt of which in Washington, D.C. was acknowledged under date of June 23, 1966 (R 140). That additional matter in support of Burroughs' Appeal was sent to the International subsequently, i.e. on June 22, 1966 (R 139), July 18, 1966 (R 153) and August 11, 1966 (R 164).

That Burroughs was fully aware of his right to appeal appears from the General President's Ruling on an appeal of Burroughs dated January 30, 1966 on another subject and a decision rendered on March 21, 1966, less than two months later (R 174).

That four (4) months from June 18, 1966 was October 18, 1966 (R 176).

That on August 23, 1966 three (3) days before the Ballot Box was to be opened and more than one month before the expiration of the four (4) month period, Burroughs filed as plaintiff in the Superior Court of the State of California in and for the County of San Joaquin a Complaint for Injunctive Relief numbered 88942 therein (R 176).

That the Complaint makes no reference to the use or attempted use by plaintiff of any internal remedies or any appeal to the International, and it does not allege that any internal remedies were not available or if available were futile or uncertain or that he would be unfairly treated (R 55-58).

That Burroughs obtained a Temporary Restraining Order replaced by Temporary Restraining Order which protected the integrity of the ballots (R 60-62).

That thereafter the Court issued its Memorandum Decision in which it held first that it had no jurisdiction by reason of 29 USC 482, secondly that the only relief for Burroughs was under Title IV (29 USC 481 et seq.) and then stated:

> "A secondary reason why this action is premature is that the petitioner has not exhausted his internal union remedies prior to the court action." (R 77)

That on the next day, September 9, 1966, Burroughs as plaintiff filed in the United States District Court for the Northern District of California, Northern Division, a complaint identical with that filed in the State Court and obtained a Temporary Restraining Order identical with that issued by the State Court on August 25, 1966 (R 52-59, R 81-83, R 86-89).

That on September 13, 1966 the District Court made the following Order:

> "The Court Ordered that the temporary restraining Order heretofore issued herein, dis-(s)olved, and the further hearing on this case continued to September 14th, 1966 for hearing." (R 103)

and on September 14, 1966, the counting of the Ballots having been completed, the following order:

> "The parties being present as heretofore, the further hearing in this case was resumed, and it appearing that the issue before the Court has now become moot, upon motion of counsel for the plaintiff, Ordered the proceedings herein terminated." (R 104)

That Burroughs was charged by Appellant Bower:

". . . with violating Article 3, paragraph (c), Article 24 of the Local Union By-laws and Article 17, Section 4 of the Constitution of the International Union of Operating Engineers

"On the 23rd day of August, 1966 he commenced a civil action against Operating Engineers Local Union No. 3 in the Superior Court of the State of California for the County of San Joaquin No. 88942 in which action he sought the following relief:

"1. That a temporary restraining order be issued forthwith enjoining the Defendants and each of them from further proceeding with the election schedule to be completed August 26, 1966 or from further interference with the rights of Plaintiffs under Section 411(a)(4) of the Act.

"2. That a preliminary injunction issue pending trial enjoining all such conduct.

"3. That a permanent injunction issue enjoining such conduct.

"4. That the conduct of Local 3's affairs be under the supervision of this Court or its appointed monitor until lawfully selected officers can be elected to Local 3.

"5. For reimbursement to plaintiffs of reasonably incurred legal fees;

"6. For costs of this action;

"7. For such other and further relief as the Court may deem proper;

without in the four (4) months next preceding commencement of the civil action or at any time having exhausted all or any remedies and reason-

> able provisions for hearing and appeal within the organization." (R 10-11).

and charged by Appellant Church similarly but by reason of the action filed by Burroughs in the United States District Court in Sacramento, California (R 12-13).

That Burroughs was found guilty by secret ballot after trial on February 2, 1967 in Sacramento on the Church charge by a vote of 220 to 134 with 15 ballots unmarked and was fined an amount equal to the additional election expense caused by that lawsuit, i.e. $3,499.08, plus the cost of defending that lawsuit, i.e. $1,081.51 (R 27).

That Burroughs was found guilty by secret ballot after trial on February 6, 1967 in Stockton on the Bower Charge by a vote of 289 to 86 with 10 unmarked ballots and was fined an amount equal to the additional election expense caused by that lawsuit, i.e. $1,674.96, plus the cost of defending that lawsuit, i.e. $902.78 (R 27).

That plaintiff appealed and requested the waiver of payment of the fine pending appeal, the Local Union concurred in Burroughs' request, and the payment of the fine was waived pending appeal (R 28).

That on June 30, 1967 the International rendered its decision as follows:

> ". . . it was regularly moved and seconded that the decisions of Local Union No. 3 and the penalties imposed by it against the appellant be upheld and affirmed but that the enforcement of

such penalties by Local Union No. 3 be stayed for a period of 3 years at which time the penalties shall be vacated, provided that the appellant does not within that period of time, directly or indirectly, take any action or support any action violative of Article XVIII (XVII), Section 4 of Constitution of the International Union, and provided further that should the appellant take or support any such action within such period of time, the penalties imposed by Local Union No. 3 shall immediately and automatically become operative and enforceable by Local Union No. 3. This motion was put to a vote and was unanimously carried" (R 20-21).

That thereafter the Defendant commenced this action.

SPECIFICATION OF ERRORS

1. The District Court erred in that the relief granted by it to Burroughs had in fact been granted him by the International as a result of his appeal to the International (R 20-21), and it is nowhere alleged that the Local or International would fail to honor the International's decision.

2. The District Court erred in finding that the doctrine of "unclean hands" does not preclude plaintiff from obtaining relief (R 221).

3. That the District Court erred:

(a) In holding that good faith alone is a defense to a violation of Article XVII, Section 4, of the International Constitution (R 22) and also to the

extent it was an issue of fact which the Court found as the basis of its decision.

(b) In determining the issue of good faith contrary to the decision of the Local Union (R 3-4, R 27-28) since if "good faith" alone was a defense, its determination was for the trier of the facts, the Local Union, and since the conduct of the trials or either of them was not attacked in this proceeding, it could not be an issue here.

(c) In holding that Burroughs was with respect to the action in the District Court in Sacramento relieved of the obligation to comply with Article XVII, Section 4, of the International Constitution by 29 USC 411(a)(4), in view of the Memorandum Decision and Minute Order in the Stockton suit (R 71-79).

4. The District Court erred in finding that the discipline of plaintiff based upon the charges was and is in violation of Sections 101(a)(4) and 609 of the Labor-Management Reporting and Disclosure Act (29 USC 411(a)(4), 529) in that it limits the right of plaintiff to institute actions under said Act and disciplines a member for exercising rights to which he is entitled under said Act, and Article XVII, Section 4, of the Constitution of the International Union of Operating Engineers is in violation of said Act as applied to the facts as found by the District Court (R 221).

5. The District Court erred in basing its decision on *Ryan v. International Brotherhood of Electrical Workers,* 361 F 2d 942 (R 228).

SUMMARY OF ARGUMENT

1. The International suspended the imposition of all penalties so long as Burroughs did not violate Article XVII, Section 4 of the International's Constitution for three (3) years (R 21), at which time the suspension would be permanent.

The relief granted, when read in the light of the District Court's remarks, is the same as that granted by the District Court. Equity does not enjoin in the absence of a wrong to be prevented or cured.

2. Since the relief sought is equitable, the equitable doctrine of "unclean hands" is applicable. In addition that doctrine raises the question of Burroughs' "Good Faith" which was and is seriously disputed by the International and the Local. This question of fact was resolved by the District Court in favor of Burroughs. The existence of the question of fact precludes the determination of this matter by Summary Judgment.

3. Contrary to the expressed opinion of the District Court (R 257-259):

(a) Good faith alone is no justification for failing to exhaust Internal Union Remedies. There must be a good faith attack on the Internal Intra-Union Remedy or in the manner of its administration since the Congressional purpose of 29 USC 411(4) first proviso was not to change existing law but to provide a certain remedy and to limit the time during which the Internal Intra-Union Remedies must be pursued.

(b) The correctness of the decision of the trier of the facts is not to be inquired into by the courts

absent an attack on the manner and form of the trial or on the triers of fact. Neither situation is involved in this action. There is no claim that Burroughs was not fairly tried.

(c) If good faith justified Burroughs' suit in the State Court in Stockton, and if he was lawfully entitled to have a Court determine whether he should first exhaust his Internal Intra-Union Remedy, he achieved that right in the Stockton suit. In that suit the Superior Court held it had no jurisdiction by reason of 29 USC 482, that such relief as Burroughs sought must be under 29 USC 482, and in any event that he had not exhausted his Internal Remedies.

Thus when Burroughs brought the action in the United States District Court in Sacramento, he had already had his day in Court; he had been told specifically how and under what statute he should proceed and that he should exhaust his Internal Intra-Union Remedies.

4. The erroneous findings depend for their validity, if any, on a misapprehension of fact and law.

5. The Court erred in following *Ryan v. International Brotherhood of Electrical Workers* (supra).

There is in 29 USC 411(4) a dual Congressional purpose, i.e., to provide the member with a remedy that was certain and to preserve the doctrine of exhaustion of Internal Remedies—the basic mistake in *Ryan,* i.e. in the language of the opinion—not the result—is that its language sacrifices one Congressional purpose to preserve another Congressional purpose.

Appellants believe that neither need be sacrificed to preserve the other and that the correct answer lies in carrying out both Congressional purposes.

Thus in those situations in which the member, in good faith, pleads a factual situation under which the doctrine of exhaustion of Internal Intra-Union Remedies has no application, i.e. there is no certain remedy, or it is futile, or there is an alleged violation of due process or fair trial, the Congressional purpose of protecting the member's right to sue should protect the member from discipline whether he wins or loses. Such protection from discipline in that situation does not defeat the Congressional intent to preserve the doctrine of exhaustion of internal remedies but in fact enforces it.

However, in a situation in which the member does not plead or attempt to plead a factual situation under which the doctrine of exhaustion of Internal Intra-Union Remedies has no application, the Congressional intent to preserve the doctrine of exhaustion of Intra-Union Remedies is defeated if such a member is not subject to discipline. Similarly the Congressional intent to protect his right to sue after exhausting Internal Intra-Union Remedies for four (4) months is defeated if a member who fails to exhaust his Internal Intra-Union Remedies within the four (4) months limitation is not subject to discipline.

In the instant case in the suit in the Superior Court and in the action in the District Court, no facts were pleaded to justify Burroughs' failure to exhaust his Internal Intra-Union Remedies or to state a cause

of action or claim under which the doctrine of exhaustion of Internal Intra-Union Remedies has no application.

ARGUMENT

INTRODUCTION

The basic question presented by this appeal is whether in our industrial society, organized and regulated as it is, the Federal Courts are to be directly and immediately involved in the day to day operation of Labor Organizations or whether their role is to protect the individual member from oppression and the denial of his right to fair play at all times.

The development and formulation of the doctrine of exhaustion of Internal Intra-Union Remedies is based upon the principle that it is the duty of the Federal Courts to protect the individual from oppression and to see to it that the individual is treated fairly at all times. However, the doctrine is also based on the further proposition that it is not the obligation of the Federal Courts to be or become involved in the day to day operation of Labor Organizations.

If, as suggested by the District Court in its oral decision and in its findings of fact and conclusions of law in the instant case, every attempt to discipline a member must first be subject to the scrutiny of a Federal Court of the United States, at the election of a member, then of necessity, and a fortiori, the Federal Courts are involved day to day in the day to day operation of every Labor Organization.

Again, if there is no reasonably clear line to govern the activities of a Labor Organization other than the opinion of a particular judge at a particular time and place, so that the law is measured by the length of the Chancellor's foot, the orderly government and administration of Labor Organizations will not be possible.

Appellants submit that when Congress adopted 29 USC 411, et seq. it did so for the purpose of preserving and protecting the rights of the members of Labor Organizations and not for the purpose of involving the Courts in the day to day operation of Labor Unions or destroying the orderly government and administration of Labor Organizations.

As stated by Congressman Griffin, one of the authors of the legislation here being considered:

> "The proviso which limits exhaustion of internal remedies is not intended to impose restrictions on a union member which do not otherwise exist, but rather to place a maximum on the length of time which may be required to exhaust such remedies. In other words, existing decisions which require, or do not require, exhaustion of such remedies are not to be affected except as a time limit of 4 months is superimposed. Also, by use of the phrase 'reasonable hearing procedures' in the proviso, it should be clear that no obligation is imposed to exhaust procedures where it would obviously be futile or would place an undue burden on the union member."
>
> 105 Daily Cong. Rec.
> App. A7915 (Sept. 4, 1959)

ERROR NO. 1

The District Court in its oral opinion said:

> "The Court: You say, 'It is further ordered, adjudged and decreed that defendant,'—and so on. This is a pretty broad order because let's assume for a moment that there may be some justification for your past actions. Am I to conclude that having one court ruling you will be justified in saying that a repeated action of the same nature would be the same?
>
> "We then end up with a sham that might very well be the basis for discipline. In other words, if the action ceased to be in good faith, isn't your suggested order too broad?
>
> "Mr. Stark: Yes, Your Honor, I think you are right" (R 257).
>
> * * * * * * *
>
> ". . . All I am basically going to enjoin is a finding suspending for the moment the past court activity, not for any possible future. I will suggest that you prepare an order accordingly" (R 228).

The end result of the Court's order is to restrain the International and Local from imposing any discipline for Burroughs' past acts in violation of Article XVII, Section 4 of the International Constitution but leaving them free to impose discipline for any future act, i.e. since as the Court said:

> "Am I to conclude that having one Court ruling you will be justified in saying that a repeat action of the same nature would be the same? We then end up with a sham that might very well be the basis for discipline" (R 257).

However, this is exactly what the International did in rendering its decision on Burroughs' appeal:

> ". . . it was regularly moved and seconded that the decisions of Local Union No. 3 and the penalties imposed by it against the appellant be upheld and affirmed but that the enforcement of such penalties by Local Union No. 3 be stayed for a period of 3 years at which time the penalties shall be vacated, provided that the appellant does not within that period of time, directly or indirectly, take any action or support any action violative of Article XVIII (XVII), Section 4 of the Constitution of the International Union, and provided further that should the appellant take or support any such action within such period of time, the penalties imposed by Local Union No. 3 shall immediately and automatically become operative and enforceable by Local Union No. 3. This motion was put to a vote and was unanimously carried" (R 20-21).

> "A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued in the absence of any evidence that the acts are likely to be repeated in the future."
>
> 43 CJS 445;
>
> *Securities and Exchange Commission v. Torr,* 87 F 2d 446.

It is not here alleged that the Local will fail to abide by the decision of the International or that the International would not enforce its decision and if such were the case then there would be a reason for the restraint.

ERROR NO. 2

The doctrine of "unclean hands" raises the question of good faith, i.e. the good faith of Burroughs in bringing the Stockton suit and the Sacramento action and is applicable in an action of this nature.

Mitchell v. Demario Jewelry, 361 US 288 (1960);

I.B.E.W. v. Gulf Power Co., 182 F. Supp. 950 (N.D.Fla 1960);

Schauffler v. Local 830, 162 F. Supp. 1 (ED Pa. 1958);

See 2 US Code Cong. & Adm. News 2235, 2437 (1959).

Here we have a seriously disputed question of fact. As stated to the District Court:

"*First*: We are not here dealing with a Union member either uneducated, uninformed or ignorant of his Intra-Union rights.

"*Second*: We are dealing with a member who:

1. Was employed for many years as a Business Representative.
2. Was a member of the Local Union By-Laws Committee.
3. Was a candidate in every election held in the Local Union from 1960 through 1966, five (5) elections in all.

"*Third*: We are dealing with a knowledgeable, articulate member who has in the past used the appellate procedures provided by the International Constitution and Union By-Laws.

"*Fourth*: A Union member who used his right to appeal on other matters during the period of

time he was in the process of endeavoring to prepare a case against the Local Union.

"*Fifth*: A member who attempted to use Title I of the Labor-Management Reporting and Disclosure Act, 1959 to disrupt the daily operations of a Union that then represented approximately 32,000 members, operating from Guam through the State of Hawaii, Northern California, Northern Nevada and the State of Utah.

"This disruption of the Local Union was one of the very things Congress sought to avoid when it adopted Title IV:

> " 'One final point is significant. Since union business must not be brought to a standstill whenever an election is challenged, it is necessary to make some provision for the conduct of business while the proceeding is in progress. It would be intolerable for the Government to appoint outsiders to act as receivers. The choice lay between keeping the old officers in office or allowing the new officers to enter upon their duties even though their right may be challenged. The latter course seems preferable. A union election could be presumed valid until the contrary can be reasonably established. There would be the least disruption of normal procedure within the unions if they were continued in office. However, the ultimate decisions upon this point should be made by the labor unions themselves. Consequently, section 302(a) provides that pending a final court decision the affairs of the union should be administered by the new officers or in such other manner as the constitution and by-laws might provide. An employer who dealt with

such officers would satisfy any duties under the National Labor Relations Act. The collective bargaining agreements they negotiated would be legally binding upon the union.'

'Legislative History of the Labor-Management Reporting and Disclosure Act of 1959—published by N.L.R.B., U.S. Govt. Printing Office, 1959, p. 417-p. 418'.

"Note not only the timing of the first lawsuit which could have been filed months before if the plaintiff was acting in good faith and with any consideration for the effects of his act on the economic well-being of his brother members.

"His first complaint was lodged with the Local Union in December, 1965. He filed his first lawsuit on August 23, 1966, eight (8) months later and just three (3) days before the Ballot Box, i.e. the Post Office Box was to be opened.

"The plaintiff in his appeal to the General President states:

'The cost of the election in Local 3 is generally reported to be in the area of $25,000 to $30,000 each.'

"Yet he deliberately and purposely, with full knowledge, let this cost be substantially increased by not filing his suit before August 10th, the first day for mailing ballots or in July before the preparations were made to mail ballots.

"Again the Restraining Order in the first suit was so drawn that if it had not been modified it would have voided the entire election.

"It was designed by plaintiff, with full knowledge of its effect, to prohibit the opening of the Post Office Box, i.e. Ballot Box. Thus, if it were

opened later, a valid claim that void ballots in an unknown number were mixed with valid ballots, could have been made.

"Fortunately, the Order of August 24, 1966, vacating the Order of August 23, 1966 prevented this plan of plaintiff from succeeding.

"Legislation passed to preserve and protect the democratic rights of members may not in good equity and good conscience be perverted to permit a dissident but articulate member to use such legislation to destroy the democratic expression of the majority of the members.

"No amount of legal legerdemain can justify the deliberate and calculated perversion of a statute to achieve the very thing the statute was passed to prevent" (R 114-R 117).

* * * * * * *

"That plaintiff's plan to render the election void by mixing valid with void ballots failed; that plaintiff's plan of charging those in the office with the waste of a substantial sum by reason of such invalidity, failed is not important. What is important is that he devised and implemented the plan.

"His will to rule or ruin is clearly exemplified by his Second Action in the United States District Court filed on September 9, 1966 and returnable after he had been told by the Superior Court of this State that:

(a) That he had failed to exhaust his Intra-Union remedy and the four month period had not expired September 13, 1966, and

(b) That his claim for relief if legitimate must be processed under Title IV and not

Title I of the Labor-Management Reporting and Disclosure Act of 1959.

"But since Plaintiff was determined to rule or ruin, he chose to ignore the Superior Court's finding, decision and order and proceeded with his attempted destruction of the Union's democratic process, well knowing that September 15, 1966 was the last day under the By-Laws for the installation of Local Union Officers.

"As we have said, that he failed does not validate his conduct or clean his hands" (R 117-118).

Thus the finding read in the light of the Court's oral opinion:

". . . There is nothing here to show there wasn't good faith on the part of the members" (R 229).

clearly shows that this disputed material issue of fact was determined by the Court adversely to the Appellants.

That the question of "good faith" in the opinion of the Court was a material fact is clear from the Court's oral opinion (R 227-229) and the Court's finding (R 221). Yet if there is an issue as to a material fact the motion must be denied.

Federal Practice and Procedures (Rules Edition) Vol. 3, pp. 121-122, Note 48 and cases cited.

The existence of this disputed question of fact was specifically called to the attention of counsel for Burroughs and the Court (R 233-234).

ERROR NO. 3

If as stated by the Court in its oral opinion:

> "You might mention the Union provisions with relation to disciplining and if they constitute further disciplining because of court action, then such disciplining under the facts of this case would be illegal because this isn't the equivalent of a sham court action. There is nothing here to show that there wasn't good faith on the part of the members. You m(ay) submit your form to counsel and seek approval as to form" (R 228-229),

then the discipline would have been proper if the suit and action in the State and Federal Courts had not been brought by Burroughs in good faith.

However, since Burroughs was convicted after trial, the question of his good faith or lack of it was decided at that time and adversely to him. Since Burroughs does not attack either the proceedings as involving any denial of due process or his day in court or the fairness of the trial and his opportunity to be heard and call witnesses, the District Court and this Court are bound by that decision.

As stated succinctly in 51 CJS 824:

> "While the courts will not overrule the decision of the Union's tribunals merely because of a difference of opinion as to the merits or determine that as an original proposition that some other action would have been better they will review the action to ascertain whether such tribunals acted in accordance with the laws of the Union" (no such issue is here presented) "and the laws of the land" (here if the law is that he is

guilty under the Constitution if he acted other than in Good Faith as stated by the Court the question was determined by the Union tribunal, and it is not an issue here) "and whether the Union officials acted in good faith" (is not here involved for while the motives of individuals are challenged, there is no challenge as to the fairness of the proceedings themselves—hence this is not an issue here.)

This brings us to a consideration of the fact that the action in the United States District Court was commenced after Burroughs had had his day in court, in the Superior Court of the State of California, and had been told in no uncertain terms that his sole avenue of relief was under 29 USC 482 and not 29 USC 411(4) or 529 (R 77-78).

As stated by the Court

"The Court: . . . let's assume for a moment that there may be some justification for your past actions. Am I to conclude that having one court ruling you will be justified in saying that a repeated action of the same nature would be the same?

"We then end up with a sham that might very well be the basis for discipline . . ." (R 227).

Yet that is exactly what Burroughs did. Having obtained a ruling from one court his repeated action of the same nature was a sham and we submit a proper subject for discipline.

Thus we respectfully submit that assuming arguendo the original action in the State Court was a

protected activity the repetition of the same act by commencing the same action in the United States District Court, after having been specifically told that his relief, if any, was under 29 USC 482, was not a protected activity. That the second proceeding was a sham and not brought in good faith and he was subject to discipline for such act.

ERRORS NOS. 4 AND 5

Error No. 4 flows from error No. 5.

In its oral opinion the Court said:

> "I would suggest that you take a look at Rhine (Ryan) vs. International Brotherhood of Electrical Workers, 361 Fed 2nd and use that as a basis for a finding and conclusion and order of the Court" (R 228).

That the internal procedures provided by the International Constitution are not too complicated or likely to result in long delays, and the remedy by appeal is no uncertain or futile remedy. This is clear from the Court's decision in *Edsberg v. Local Union No. 12, International Union of Operating Engineers,* 300 F 2d 785-787 (1962) in which the same constitution was involved.

This Court in *Fruit and Vegetable Packers and Warehousemen Local 760 v. Morley,* 378 F 2d 738-745 again stressed the fact that the doctrine of exhaustion of union remedies required an available remedy, neither uncertain nor futile.

In the instant case from December 12, 1966 to the date of the filing of his first suit, Burroughs had an available remedy, neither uncertain nor futile. He, however, elected to wait six (6) months before invoking the remedy.

We submit that properly understood the exhaustion of Intra-Union Remedies is an absolute requirement before asking the Federal Courts to intervene in intra-union activities.

As stated by this Court in *Edsberg,* supra:

> "We need not decide whether exhaustion of remedies provided by the Union is an absolute requirement before asking the federal courts to intervene in intra-union activities" (R 106).

The difficulty with this problem stems from semantics.

The difficulties arise from the fact that for many years the Courts and lawyers have spoken and written of so-called "exceptions" to the doctrine.

Thus in *Destroy v. American Guild of Variety Artists,* 286 F 2d 75 we find the Court saying at page 79:

> "If we look to the substantial body of state law on the subject, we find that the general rule requiring exhaustion before resort to the courts has been almost entirely swallowed up by the exceptions phrased in broad terms."

There are no "exceptions". What we have is the impact of other and equally valid legal principles on the Doctrine of Exhaustion of Internal Remedies.

First—There must be a remedy. Obviously if there is no intra-union remedy the rule can have no application. This is no "exception".

Second—The remedy must be neither uncertain nor futile—it must be one capable of being used. An unreasonable remedy is no remedy. This is no "exception".

Third—The remedy must be one that meets the test of due process. This is no "exception": procedures in the Courts can be subject to ancillary attack for this reason by various types of writs.

Fourth—The body or individual given the authority to decide the matter must be fair and impartial and may not prejudge the issue. This is no "exception". Here the basic doctrine of a fair trial comes into play, and the Courts are subject to ancillary attack for the same reason.

In other words, the doctrine, the rule is subject to all of the limitations that all Courts and quasi-judicial bodies are subject to. But these are not "exceptions".

Thus an action brought in the Federal Court because there is no remedy, or if there is a remedy because it is uncertain or futile is not an exception to the doctrine of exhaustion of Internal Intra-Union Remedies. The facts which call the rule and doctrine into being do not then exist. This is not an exception.

Again, if there is a lack of due process or a fair trial, we do not have an exception to the rule. We do have a question as to whether any "remedy" in fact exists and is available.

The word "remedy" imports one which pays due regard to due process and fair play, one in which the member has, to use a colloquialism, "a fair shake".

Now the plaintiff herein did not in the Superior Court in Stockton or in the Federal District Court in Sacramento allege that he brought the suit or action:

1. Because there was no remedy available,

2. Because there was a defect of due process, or

3. Because he would not get a fair hearing.

Had he so acted, we would not be here since the issue would have been not the application of the doctrine of exhaustion of remedy but whether the doctrine under the facts was applicable. These questions honestly and seriously urged, and they were not, would have placed before the Court the basic question —Did the member have an Intra-Union remedy?

Now, when we read 29 USC 411(a)(4) which provides as follows:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislature: *Provided That any such member may be required to exhaust reasonable*

> *hearing procedures (but not to exceed a fourth-month lapse of time within such organization, before instituting legal or administrative proceedings against such organization or any officer thereof: And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition." (Emphasis added)

It is clear that if "reasonable hearing procedures" exist, the prohibition against bringing an action in a Court for a period of four months is absolute.

If the question is whether or not "reasonable hearing procedures" exist, then the doctrine has no application unless it is determined that "reasonable hearing procedures" exist and of course resort to the Courts would be proper to determine that issue.

The issue, however, would not be the member's grievance but whether "reasonable hearing procedures" were provided, and thus if they were and the Court so found, an attempt to further litigate the grievance would call the Constitutional provision prohibiting such suits into effect. If, however, the Court found that no "reasonable hearing procedures" existed, then there is no remedy to exhaust and the Constitutional provision is of no force or effect.

However, that was not the case here. There was no attack on the Constitutional provisions approved in *Edsberg v. Local Union No. 12, I.U.O.E.* (supra) some four years prior. There was no attack on the General President or the General Executive Board in

either the Stockton Superior Court action or that in the United States District Court in Sacramento. There was no question of due process or a fair trial.

In the suit brought in the Stockton Superior Court sitting in Stockton, the Court made and entered its order as follows:

> "A secondary reason why this action is premature is that the petitioner has not exhausted his internal union remedies prior to the court action.
>
> "Sections 411 and 482 of the 1959 Act provide that a member is not entitled to bring a court action unless he has first exhausted his hearing procedures and appeal remedies within the Union.
>
> "It has been held that this requirement includes the appeal remedies within the International parent union as well as the Local (Edsburg v. Local 12 of the Operating Engineers, 300 F.2d 285 [Calif.Dist.Ct.]).
>
> "The Local and/or the International are then given four months to redress the wrong before a court action is permissible.
>
> "In the present case the petitioner exhausted his remedies within his Local but did not commence his appeal remedies within the International until late June of 1966. The International has not granted him any redress but the four month time limit in which it may act has not expired."

While there is considerable diversity of opinion among the Circuits, they are in agreement with respect to Congressional Intent, namely that Congress desired to guarantee every member the right to test

union action in the courts and at the same time to preserve intact the doctrine of exhaustion of internal remedies with the limitation that no more than four months need be devoted to exhausting reasonable procedures.

See:

Destroy v. American Guild of Variety Artists, 286 F 2d 75, cert. denied 366 US 929;

Harris v. International Longshoremen's Ass'n, Local 1291, 321 F 2d 801.

While we have no quarrel with the decision reached in *Ryan v. International Brotherhood of Electrical Workers* (supra) we seriously question its reasoning since it sacrifices one Congressional purpose to sustain another.

This violates the basic concept of statutory interpretation which requires that a statute be interpreted so as to fully effectuate its purpose or purposes.

Incidentally the reasoning of this Court in *Fruit and Vegetable Packers and Warehousemen Local 760 v. Morely* (supra) properly applies to the *Ryan* case (supra) since there was no intra-union remedy whereby the member could obtain a binding determination as to the interpretation of the union contract with an employer.

As we view the case the result is correct for the reasons set out in *Morely* (supra).

In *Destroy v. American Guild of Variety Artists* (supra), again we have a complete absence of a

remedy that was neither uncertain nor futile—again we have a case squarely within the rule announced by this Court in *Morely* (supra).

In *Harris v. International Longshoremen's Ass'n Local 1291* (supra), we have a case in which the dispute was intra-union, where there was an intra-union remedy which was neither uncertain nor futile, i.e. a factual situation falling within the ambit of the doctrine of exhaustion of internal remedies, and the Court applied the doctrine.

Thus we submit that in those cases in which the doctrine of exhaustion of internal remedies applies, the requirement is absolute.

We, however, in order not to fall into the basic error in the *Ryan* case (supra) prefer to state the rule as follows:

In those cases in which a member sues and in good faith pleads a factual situation under which the doctrine of exhaustion of Internal Intra-Union Remedies does not apply, he is protected by the Statute whether he wins or loses.

That in all other cases he is required first to exhaust, for a period of not to exceed four (4) months, his Internal Intra-Union Remedies or be subject to discipline.

CONCLUSION

Appellants respectfully submit that the District Court's order granting Summary Judgment should be

reversed and the Complaint dismissed for failing to state a claim on which relief may be granted.

Dated, San Francisco, California,
July 25, 1968.

Respectfully submitted,
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Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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